MOTION FILED
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No. 84-468

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1984

CITY OF CLEBURNE, TEXAS, et al.,
Petitioners,

v.

CLEBURNE LIVING CENTER, INC., et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF FOR DISABLED PEOPLES' INTERNATIONAL AND HUMAN RIGHTS ADVOCATES, INC.

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France (July 5, 1982) 7,8

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Disabled Peoples' International and Human Rights Advocates, Inc. move for leave to file the attached brief amici curiae. Opposing counsel has not consented.

1. Disabled Peoples' International (hereinafter DPI) is a non-profit organization of physically, sensorily and mentally impaired people founded in 1981 to obtain full participation and equality for disabled persons in all societies. DPI's members, from nearly 100 countries, include disabled national legislators, judges, scholars and leaders of international reknown. DPI was granted consultative status with the United Nations in 1983. Reports issued by DPI are used by the United Nations and other international bodies. DPI actively participates in United Nations human

rights forums and at the Organization of American States. DPI is acutely concerned with discrimination against disabled people and institutional barriers to effective redress.

2. Human Rights Advocates, INC. (hereinafter HRA) is a non-profit corporation established to promote and protect human rights. HRA provides public education about the uses of international human rights law in domestic and international forums. HRA members have worked in the United Nations Human Rights Centre, the Office of the United Nations High Commissioner for Refugees, the Inter-American Commission on Human Rights of the Organization of American States, and the Council of Europe. HRA members regularly represent human rights concerns in international forums and have written numerous scholarly works on international law.

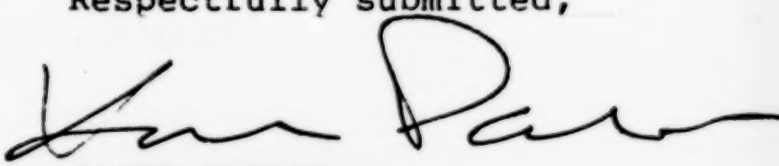
3. Amici would like to present the Court with relevant international standards that should be taken into account in determining Respondents' equal protection claim. A brief on international norms is desirable because of the value of these norms in guiding the Court and because amici are aware that neither party will address them. The international norms applicable in this case deal specifically with the right of mentally retarded persons to effective redress for discriminatory practices. International standards both inform domestic laws and provide independent rights. See, e.g., Wyatt v. Stickney, 344 F. Supp. 387, 390 n.6 (M.D. Ala. 1972), aff'd sub. nom, Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974) (international instrument on rights of mentally retarded provide guidance); Lareau v. Manson, 507 F.Supp. 1177 (D.Conn. 1980)(international standards on

treatment of prisoners inform the Eighth Amendment of the United States Constitution), and The Paquete Habana, 175 U.S. 677 (1900)(customary international law protects coastal fishing vessels from wartime seizure even though permitted under domestic law).

CONCLUSION

The activities and experience of amici give them a unique perspective on and substantial interest in the issues before the Court. For these reasons, amici respectfully request that this motion for leave to file a brief amici curiae be granted.

Respectfully submitted,



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BRIEF OF DISABLED PEOPLES' INTERNATIONAL AND HUMAN RIGHTS ADVOCATES, INC., AS AMICI CURIAE

INTEREST OF THE AMICI

Amici curiae have set out in the motion for leave to file this brief their endeavors to secure human rights for mentally retarded persons and any other persons who are subjected to practices that contravene international law. Disabled Peoples' International has members who will be directly effected by the outcome of this case. Human Rights Advocates, INC. works to promote and protect international law rights of mentally retarded persons.

SUMMARY

At issue in this appeal is the standard of review to be used to redress discriminatory practices directed at mentally retarded persons.

Amici curiae respectfully request the Court to uphold the result of

the judgment of the United States Court of Appeals for the Fifth Circuit entered on March 5, 1984 and reported at 726 F.2d 191.

Amici curiae will set forth relevant international standards showing that (1) mentally retarded persons, as an identifiable class, are entitled to full and effective redress for discriminatory practices directed against them, and (2) a rational basis standard of review fails to provide mentally retarded persons with that redress.

Amici curiae respectfully urge that the Court, guided by internationally accepted human rights norms, find that mentally retarded persons are entitled to full and effective redress for discriminatory practices.

ARGUMENT

Mentally retarded person have been killed, enslaved, sterilized, ostracized, debased, and dehumanized by all societies throughout recorded history. Every state of the United States and every member state of the United Nations has institutions or other set-apart areas where mentally retarded people are sent to live. Yet it is a tragic irony that mentally retarded people frequently become invisible and unidentifiable as a class when they or their supporters attempt redress for even the most blatant discriminatory practices. In recognition of this intolerable situation, the international community has been compelled to clarify the human rights of mentally retarded persons so that they are understood as minimum acceptable standards of conduct for civilized nations.

I. MENTALLY RETARDED PERSONS ARE AN IDENTIFIABLE CLASS ENTITLED TO FULL EQUALITY UNDER INTERNATIONAL LAW

A. International Law Honors the Principles Of Equal Rights And Non-Discrimination

International law affirms the dignity and worth of the human person. U.N. Charter, 2d preamb. para. To implement this concept, the United Nations promulgated the Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/810 at 71 (1948)(hereinafter Universal Declaration). The Universal Declaration provides "a common standard of achievement for all peoples and all nations." Id., proclam. para. In the American regional system, there is recognition that American solidarity requires "a system of individual liberty and social justice based on the essential rights of man." O.A.S. Charter, 3d preamb. para. To implement this concept, the Organization of American States promulgated the American

Declaration of the Rights and Duties of Man, Ninth International Conference of the American States, O.A.S. Res. XXX (1949) (hereinafter American Declaration). The American Declaration proclaims, inter alia, that:

> national constitutions recognize that juridical and political institutions . . . have as their principle aim the protection of the essential rights of man and the creation of circumstances that will permit him to achieve spiritual and material progress and attain happiness.

Id., 1st declar. para. Individuals hold rights not because they are of a certain nationality but because these rights are attributes of the human personality. Id., 2d declar. para.

Both instruments set forth minimum standards relevant and applicable to this case. The Universal Declaration provides, in pertinent part:

> Article 1. All human beings are born free and equal in dignity and in rights. They are endowed with reason and conscience and

> should act towards one another in a spirit of brotherhood.
>
> Article 2. Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, natural or social origin, property, birth or other status.
>
> . . .
>
> Article 7. All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration
>
> . . . .

Universal Declaration, articles 1, 2, and 7 (emphasis added). The American Declaration contains parallel provisions. American Declaration, 1st preamb. para. and article II.

The equal protection and non-discrimination provisions of international human rights law are universally acknowledged as imperative if there will be effective realization of any other protected rights of the human person. As one international expert states:

> The claim of equality before the law is in a substantial sense the most fundamental of the rights of man. It occupies the first place in most written constitutions. It is the starting place of all other liberties.

Lauterpacht, An International Bill of the Rights of Men 115 (1945). These norms occupy the first place in international human rights documents.

B. International Law Protects, In Particular, The Rights Of Mentally Retarded Persons

With noteworthy insight, the international community recognizes that the ineluctably linked principles of equal protection and non-discrimination protect the biological tendency towards diversity: international law honors individual differences while requiring aggregate equality. Address by R.J. Dupuy, Member, Academie de France, Opening ceremony, Institut International des Droits de l'Homme, Strasbourg, France (July 5, 1982)(full text in library of Institut).

International law provisions respecting non-discrimination presume equality with differences: "egalite pour tous -- difference pour chacun." Id. See also South West Africa Cases (Second Phase 1966), 1966 I.C.J. 248, 311 (Tanaka, J., dissenting)(humans, though different, equal in dignity as persons).[1]

Persistent exploitative and discriminatory practices directed at mentally retarded persons prompted the United Nations to promulgate the Declaration on the Rights of Mentally Retarded Persons, G.A. Res. 2856, 26 U.N. GAOR, Supp.(No.29) at 93, U.N. Doc. A/8429

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[1] The right to non-discrimination is also essential in international humanitarian law. E.g. Geneva Convention IV of 1949, in force Oct. 21, 1950, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287, arts. 3, 13. Differences in treatment relate only to better protection of the rights of protected persons. See J. Pictet, Fundamental Principles of Humanitarian Law 39-45 (Geneva 1966).

(1971)(hereinafter Declaration on Mentally Retarded). This instrument sets forth some specific rules recognizing the differences inherent among people with mental retardation and how these differences should be addressed in conformity with equal protection rights and other rights contained in, inter alia, the Universal Declaration. Declaration on Mentally Retarded, 3d preamb. para. Of particular importance, the United Nations affirms that mentally retarded persons have the same rights as other human beings "to the maximum degree of feasibility." Id., op. para.1. In certain circumstances mentally retarded persons are granted special rights not granted others in order to better protect or exercise their universally recognized interests. For example, mentally retarded persons have the right to "rehabilitation and guidance" (Id., op. para. 2) and the "right to a qualified

guardian when this is required to protect [their] well-being and interests." Id., op.para. 5. Additions, exceptions or limitations to rights are always to be viewed according to whether they tend to promote integration of mentally retarded persons into ordinary community life or whether they tend to perpetuate discriminatory attitudes or isolation. Id., 5th preamb. and op. para. 4. Restrictions that tend to perpetuate discriminatory attitudes or foster isolation clearly contravene the Universal Declaration as it applies to mentally retarded persons.

Because of continuing violations of the rights of mentally retarded persons and other persons with disabilities, the United Nations identified certain rights of all disabled persons, including mentally retarded persons. Declaration on the Rights of Disabled Persons, G.A. Res. 3447, 30 U.N. GAOR, Supp.(No.34) at 88,

U.N. Doc. A/10034 (1975)(hereinafter Declaration on Disabled Persons). This instrument reaffirms the obligation of states to pursue policies of full integration in normal life. Declaration on Disabled Persons, 1st preamb. para. Particularly relevant to this case, the Declaration on Disabled Persons provides, in pertinent part:

> 3. Disabled persons have the inherent right to respect for their human dignity. Disabled persons, whatever the origin, nature and seriousness of their handicaps and disabilities have the same fundamental rights as their fellow citizens of the same age, which implies first and foremost the right to enjoy a decent life, as normal and full as possible.
>
> 4. Disabled persons have the same civil and political rights as other human beings.
>
> . . .
>
> 10. Disabled persons shall be protected against all exploitation, all regulations and all treatment of a discriminatory, abusive or degrading nature.

Declaration on Disabled Persons, op. paras. 3,4, and 10.[2]

Deep concern about, inter alia, the gravity of discriminatory practices directed at mentally retarded and other persons with disabilitites and awareness of the need to reaffirm principles of human rights, fundamental freedoms and the dignity of the human person inspired the United Nations to proclaim 1981 International Year of Disabled Persons. G.A. Res. 31/123, 31 U.N. GAOR, Supp.(No. 39) at 104, U.N. Doc. A/31/39 (1976). By subsequent resolution, the United Nations proclaimed the theme of the International Year: "Full participation and equality." G.A. Res. 34/154, 34 U.N. GAOR, Supp.(No. 46) at 178, U.N. Doc. A/34/46 (1979). At the conclusion of the International Year, the United Nations adopted the World Programme of Action Concerning Disabled

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[2] International human rights law protects all persons from "inhuman, or degrading treatment or punishment." Universal Declaration, art. 5.

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Persons. G.A.Res. 37/52, 37 U.N. GAOR, Supp.(No. 51), U.N. Doc. A/37/51(1982) (hereinafter World Programme). The World Programme provides, in pertinent part:

> In considering the status of disabled persons with respect to human rights, priority should be placed on the use of the United Nations covenants and other instruments . . . that protect the rights of all persons. This principle is consistent with the theme of the International Year of Disabled Persons.

World Programme, para. 163 (emphasis added).

As mandated by paragraph 169 of the World Programme, the United Nations Commission on Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities (hereinafter Sub-Commission) passed a resolution reminding the international community that article 2 of the Universal Declaration "applies also to disabled persons." U.N. E.S.C. Commission on Human Rights Sub-Commission on Prevention of Discrimination and Protec-

tion of Minorities, Res. 1982/1, U.N. Doc. E/CN.4/1983/4 at 71 (1983). The Commission on Human Rights and the Sub-Commission continue to pay particular attention to the human rights problems of mentally retarded and other persons with disabilities. See U.N. E.S.C. Commission on Human Rights Sub-Commission on Prevention of Discrimination and the Protection of Minorities, Res. 1983/15, U.N. Doc.E/CN.4/1984/3 at 82 (1984); U.N. E.S.C. Commission on Human Rights Res. 1984/31, 40 U.N. ESCOR, Supp.(No.4) at 67, U.N. Doc. E/1984/14 (1984); U.N. E.S.C. Commission on Human Rights Sub-Commission on Prevention of Discrimination and Protection of Minorities Res. 1984/24, U.N. Doc. E/CN.4/1985/___ (1985). The situation of mentally retarded and other disabled persons is considered so grave that the Commission on Human Rights authorized a Special Rapporteur, appointed by the Sub-

Commission in 1984, to report on, inter alia, "[a]ll forms of discrimination against disabled persons." Sub-Commission Res. 1984/24, supra, op. para.2. See also Written Statement Submitted by Disabled Peoples' International, a non-governmental organization in consultative status, U.N. E.S.C. Commission on Human Rights (Agenda item 12), U.N. Doc. E/CN.4/1984/NGO/30 (1984).

Amici curiae conclude that international norms and action decisively indicate that mentally retarded persons are entitled to full equality before the law and that mentally retarded persons constitute a class of persons universally recognized as vulnerable in their ability to exercise their rights. Mentally retarded persons are a class of persons whose differences mandate special efforts to assure that their rights are protected.

II. THE RATIONAL BASIS STANDARD OF REVIEW DENIES MENTALLY RETARDED PERSONS THEIR RIGHT TO AN EFFECTIVE REMEDY UNDER INTERNATIONAL LAW

The rights of mentally retarded persons cannot be safeguarded effectively by a mere rational basis standard of review. The Universal Declaration provides that all persons, including mentally retarded persons, are entitled to an "effective remedy by the competent national tribunals" when their rights, including, preeminently, their right to non-discriminatory practices, are violated. Universal Declaration, article 7. Accord, American Declaration, article XVIII. See also, American Convention on Human Rights, in force July 18, 1978, O.A.S. T.S. No. 36, article 25 (informs meaning of article XVIII of the American Declaration). Barriers to redress, such as class identification analyses that preclude effective suits under equal protection guidelines, led the United

Nations to call for strengthening procedures whereby mentally retarded persons may seek redress for human rights violations such as discrimination in housing. Sub-Commission Res. 1982/1, op. para. 1; Sub-Commission Res. 1983/15, op. para. 5; Commission on Human Rights Res. 1984/31.[3]

A. The Rational Basis Test Fails to Account for Special Differences

Under current rational basis analysis, a law, even if facially discriminatory, is entitled to a presumption of validity and is upheld if some

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[3] The Organization of American States Inter-American Commission on Human Rights concurs with the United Nations' preoccupation with legal impairments. Disabled persons "form[] a sector whose rights no one defends, and whose needs receive scant attention. . . . In fact they are often excluded from the legal system. . . . " 1980-1981 Annual Report, O.A.S. Inter-American Commission on Human Rights, O.A.S. Doc. OEA/Ser.L/V/II.54 (1982) at 126-127.

relationship can be found to legitimate government purposes. See Plyler v. Doe, 457 U.S. 202, 216 (1982); San Antonio Independent School District v. Rodriquez, 411 U.S. 1, 40, 55 (1973). This standard is particularily inappropriate to review laws affecting mentally retarded persons because of the special differences between mentally retarded persons and non-mentally retarded persons, and among mentally retarded persons themselves, recognized in international law. Intense review of any provision burdening the rights of a class of persons acknowledged to have special differences is logically necessary because it is that classes' rights and interests that must be ascertained and protected in conformity with equal protection and non-discrimination principles. A primary thrust in the directives of international law protections of mentally retarded persons has been to assure serious review

of any action restricting rights of mentally retarded persons. For example, international law provides:

> Whenever mentally retarded persons are unable . . . to exercize all of their rights in a meaningful way or it should become necessary to restrict or deny some or all of these rights, the procedures used for that restriction or denial of rights must contain proper legal safeguards against every form of abuse. This procedure must be based on an evaluation of the social capability of the mentally retarded person by qualified experts and must be subject to periodic review and the right of appeal to higher authority.

Declaration on Mentally Retarded, op. para. 7.

In this case, mentally retarded persons as a class have been denied the right to equal housing opportunities without any legal safeguards at all, much less those that look to individual abilities. The rational basis test does not look to whether mentally retarded persons are able to exercise their rights:

the focus is on the rationality of the government's acts.

B. Derogation From The Principles Of Equal Protection And Non-Discrimination Is Only Permitted In Extreme Circumstances

The rights of equal protection and non-discrimination are only derogable in extreme circumstances (war, public danger or emergency that threatens the independence or security of the state) in all international and regional human rights treaties, indicative of the common understanding of the international community of the importance of these rights. See, e.g., International Covenant on Civil and Political Rights, in force Mar. 23, 1976, G.A. Res. 2200, 21 U.N. GAOR, Supp.(No. 16) at 52, U.N. Doc. A/6316 (1967), article 4; American Convention on Human Rights, in force July 18, 1978, O.A.S. T.S. No. 36, article 27; European Convention on Human Rights and Fundamental Freedoms, in force Sept. 3,

1953, Europ. T.S. No. 5, article 15. An ordinance, like the one in question here, that specifically names a class of persons to be excluded by biological attributes is not entitled to deference and must be presumed to be invalid unless the criteria for derogation are shown. A standard of constitutional review higher than rational basis must prevail where, as here, internationally recognized human rights are at issue.

C. Housing Has A Special Significance In Achieving Full Equality For And Integration Of Mentally Retarded Persons

Discrimination in housing directed at mentally retarded persons has received extraordinary attention by the international community because of the mandate for integration to rectify a particular evil -- the historic isolation of disabled persons in special living arrangements. The international community recognizes the importance of the style of

living and access to housing that disabled persons need to realize equality. Housing styles should be as similar as possible to the housing styles of non-mentally retarded persons. Equal housing opportunities are essential to accomplish full equality and participation. Declaration on Mentally Retarded, op. para. 4; Declaration on Disabled Persons, 6th preamb. para.; G.A. Res. 31/123, 31 U.N. GAOR, Supp.(no. 39) at 104, U.N. Doc. A/31/39 (1976), 3d preamb. para; World Programme, paras. 1, 21, 114. Integration logically requires residential choices equal to residential choices of others, yet tailored to the unique needs of mentally retarded persons. For mentally retarded persons, tailoring may consist of supportive assistance in a group home setting. See, World Programme, paras. 24,25,115. Denial of housing opportunities because of certain special needs of mentally retarded persons contra-

venes the international law directives.

CONCLUSION

Societies continually undergo adjustments, adapting themselves to new standards of civilized practices. Standards that were acceptable or useful at one stage of development may require a sea change at a later one. The international community has now set forth standards of achievement that reflect the current understanding of civilized practice regarding mentally retarded persons. International law requires that all nations resolutely move forward in a constant effort to match domestic performance with international expectation. See, Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain), 1970 I.C.J. 4, 33 (principles and rules of human rights are obligations owed by all states to the international community as a whole). It is up to

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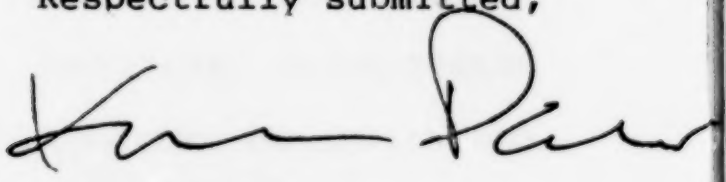
civilized societies to at least root out discrimination in its crudest forms.

Amici curiae respectfully urge the Court, guided by international human rights norms, to uphold the result of the judgment of the court of appeals.

Respectfully submitted,



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